IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 735

THE BALTIMORE TRANSIT COMPANY AND THE BALTIMORE COACH COMPANY,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX

TABLE OF CASES

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of The United States:

The petitioners, THE BALTIMORE TRANSIT COMPANY and THE BALTIMORE COACH COMPANY, pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Fourth Circuit entered on January 10, 1944, enforcing, as modified, an order issued by the National Labor Relations Board against the petitioners on February 1, 1943.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 13 L. R. R. 663, and is printed in the proceedings in this case, R. III, 526. The findings and order of the Board appear in the record R. I, 1-22,[1] and are printed in 47 N. L. R. B. No. 18.

JURISDICTION

The judgment and decree, and the opinion of the Circuit Court of Appeals were entered on January 10, 1944. The jurisdiction of this Court is invoked under 28 U. S. C. 347 (a), Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; and under Section 10 (e) and (f) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*)

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, the Board's rules and regulations, and the National Labor Relations Board Appropriation Act, 1944, are set forth in the Appendix.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioners own, maintain and operate the mass transportation system in the City of Baltimore, Maryland, and environs. The Baltimore Transit Company owns and oper-

[1] Pursuant to a stipulation of the parties (R. III, 540) the record for the purposes of the petition for a writ of certiorari consists of three volumes. The first and second volumes contain the portions of the record printed in two volumes by the National Labor Relations Board as an appendix to its brief in the Circuit Court of Appeals. These are referred to herein as R. I and R. II, respectively. The third volume of the record contains the portions of the record printed by petitioners as an appendix to their brief in the court below and the proceedings in the Circuit Court of Appeals and is referred to herein as R. III. The certified copy of the transcript of the entire record before the Board is referred to herein as Tr. The National Labor Relations Act is referred to as the Act, and the National Labor Relations Board as the Board.

ates all electric street passenger railway cars in the city and vicinity; and all electric trackless trolleys. Its wholly owned subsidiary, the Baltimore Coach Company, owns and operates all gasoline and oil buses on fixed routes and schedules in the city and vicinity, except a comparatively few buses individually owned and operated. Petitioners' transportation facilities are concentrated mainly within the territorial boundaries of the city, and no operation crosses the State line. There are about 30 street car lines, 3 trackless trolley lines and 22 bus lines, all operating on fixed routes and schedules and charging the fares approved by the Public Service Commission of Maryland. Petitioners employ about 3,600 persons, of whom about 3,000 are employed as operators, conductors, motormen, in repair shops, and in the way and structures, power and miscellaneous departments; and about 600 in supervisory, clerical and stenographic capacities. Petitioners in 1941 had transportation revenue of $14,790,473.14, and carried 160,050,906 revenue passengers.

The Independent Union of Transit Employees of Baltimore, succeeded previous associations, and was recognized by the petitioners as the bargaining agent for their employees in November, 1937. It was dissolved during the summer of 1943, after the Board's order in this case, and is not now in existence. The labor contracts involved in this case were executed on January 1, 1942 (wages) and January 18, 1942 (working conditions). Neither these nor previous annual contracts had provisions for a closed shop or for union membership maintenance. Dues were checked off and paid to the Independent Union by petitioners on individual requests of members, but there were a number of employees who paid their dues directly to the union.

On August 6, 1937, the Transport Workers Union of America (C. I. O.) filed charges against petitioners, al-

leging violations of the Act. On September 29, 1937, the Board's Regional Director, with whom the charges had been filed, after investigation, dismissed the charges for lack of jurisdiction, and so notified the petitioners. The Union then appealed to the Board, and on April 29, 1938, the Board affirmed the Regional Director, and notified the Union. No effort was made to have the ruling reviewed by the Circuit Court of Appeals, so that it was in effect when the complaint herein was filed.

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1300 (AFL) began to organize petitioners' employees in the fall of 1941. The complaint in this case was issued on June 2, 1942, and is based on charges filed by that Union the previous day, alleging violations of Sections 7 and 8 (1), (2) and (3) of the Act. After a hearing before the trial examiner, he filed an intermediate report in which he found that petitioners' activities affected interstate commerce, and that petitioners had committed certain unfair labor practices. Petitioners duly filed exceptions to the intermediate report, and the findings, rulings and recommendations therein, and also to rulings and incidents occurring during the hearing. Petitioners insisted throughout the hearing that the Act did not apply to them, and that their operations did not affect interstate commerce, and that the Board's prior ruling to that effect was correct and should be followed. The Board, on February 1, 1943, adopted, with minor exceptions, all of the findings and the recommendations of its trial examiner, reversed its previous ruling that it lacked jurisdiction, and ordered petitioners to cease and desist from their alleged unfair labor practices (all of which occurred during the period when the Board's ruling that the Act did not apply to petitioners was in effect); to reimburse all employees who were mem-

bers of the Independent Union for dues checked off subsequent to June 2, 1942, when the complaint herein was filed; to reinstate nine discharged employees, and to reimburse them for loss of earnings subsequent to June 2, 1942; to reinstate a tenth employee after the termination of his service in the armed forces; and to post notices of compliance and of the right of employees to join two designated labor organizations, the Amalgamated Association (AFL) and the International Brotherhood of Teamsters (AFL).

Subsequently the Board filed a petition for enforcement in the Circuit Court of Appeals for the Fourth Circuit. Thereafter, petitioners filed a motion to stay the proceedings because the Congress by the National Labor Relations Board Appropriation Act, 1944, prohibited the use of the appropriated funds in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed. The Circuit Court of Appeals denied the motion. After hearing on the Board's petition for enforcement, the Circuit Court of Appeals entered its judgment and decree requiring the Board's order to be enforced, but modifying it only so as to give petitioners credit on reimbursement for checked off dues in the amount turned over to them for the purpose by the Independent Union at the time of its dissolution.

QUESTIONS PRESENTED

1. Whether the Act applies to petitioners, who are exclusively engaged in the maintenance and operation of a local public passenger transportation system wholly within the City of Baltimore and environs, and wholly within the State of Maryland.

2. Whether the Act applies to petitioners because among the passengers who use their facilities are persons who are on their way to or from work in industrial plants, some of which are engaged in producing goods for interstate commerce; there being no obligation on petitioners to supply such plants with service of any kind.

3. Whether the Act applies to petitioners because they purchase in the City of Baltimore for their own use gas and oil which at some time "originated" outside the State, but which was not brought into the State by the petitioners or on their request; or because petitioners purchase, from time to time, outside of the State, equipment such as street cars, buses, trackless trolleys and other materials and supplies, which are used and consumed by petitioners in their own business; or because petitioners purchase in the City of Baltimore electrical energy the greater part or all of which is generated in the City of Baltimore, and none of which is brought into the State by petitioners, or by the company which sells the energy to petitioners.

4. Whether the Act applies to petitioners because they operate their vehicles on routes which pass in close proximity to stations and wharves of interstate carriers; or because, prior to the year 1935, but not thereafter, they occasionally chartered buses for trips outside the State; or because the Post Office Department requires petitioners, under compulsion of an Act of Congress, to carry a small amount of mail in sealed pouches; or because petitioners carry a small number of local newspapers; or because petitioners contract to sell space for advertising in their vehicles.

5. Whether the Board has power to reverse its prior ruling that it lacks jurisdiction over petitioners and that the Act does not apply to them; and whether the Board

is estopped from entering any order based on findings of violations of the Act by petitioners during the period when the Board's ruling that it lacked jurisdiction was in effect.

6. Whether the Board's order as modified by the judgment and decree of the Circuit Court of Appeals, is invalid in part or as a whole because:

(a) petitioners have been ordered to reimburse members of the Independent Union for their dues checked off, although there was no closed shop and no requirement of any kind that members' dues be checked off by petitioners;

(b) petitioners have been ordered to post notices stating that their employees are free to remain or become members of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1300, (AFL) and the International Brotherhood of Teamsters, etc. (AFL), and stating that employees will not be discriminated against because of membership in or activity on behalf of said designated labor organizations, thus implying an unlawful limitation on the employees' choice of union affiliation;

(c) petitioners have been ordered to reimburse employees for the amount of dues checked off subsequent to June 2, 1942, the date when the complaint herein was filed, although the Board did not reverse its ruling that it lacked jurisdiction until February 1, 1943, the date when its order was issued; to reimburse certain discharged employees for loss of earnings subsequent to June 2, 1942, although the Board's ruling that it lacked jurisdiction was not reversed until February 1, 1943; and to reinstate certain discharged employees with seniority rights and other privileges from the dates of the respective discharges, although such discharges occurred not only prior to February 1, 1943, but even prior to June 2, 1942;

(d) the findings of the Board that petitioners have engaged in and are engaging in unfair labor practices in violation of Section 8 (1), (2) and (3) of the Act are not supported by substantial evidence;

(e) petitioners were not accorded a fair and impartial hearing by the Board's trial examiner.

7. Whether the Act of Congress known as Title IV of Public Law 135 of the 78th Congress, approved July 12, 1943, cited as "National Labor Relations Board Appropriation Act, 1944", prohibits the Board from prosecuting its petition for enforcement during the effective period of said Act.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question which has never been but should be settled by this Court, namely, whether the Act applies to an employer engaged exclusively in the maintenance and operation of a local public passenger transportation system (here, street car and bus lines), wholly intrastate in character.

The question is obviously one of great and far-reaching importance, for it involves the legal status, so far as the application of the Act is concerned, not only of intrastate street car and bus companies but also of taxicab, drive-it-yourself and truck companies, and other employers whose operations do not extend beyond state lines. If the decision of the lower Court is permitted to stand, the basis and purpose of state regulatory acts will be seriously impaired if not destroyed; and state labor relations boards, wherever they have been created, will be deprived of all useful jurisdiction. Moreover, if the Board now has the power to regulate the labor relations of wholly local and intrastate utilities, it may eventually become futile for state com-

missions to attempt to regulate rates, quality and quantity of service of such utilities; and all such regulation will in the end become federalized. The effect of the holding of the Court below is so to apply the Act as to regulate practically all industry, "thus invading the reserved powers of the States over their local concerns", and nullifying the limitations on the application of the Act as determined by this Court in *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, 29 (1937); *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466-467 (1938); and *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 221-222 (1938).

The principal ground upon which the Board assumed jurisdiction of this case was that, among the passengers who use the petitioners' transportation facilities, are persons who are on their way to or from work in industrial plants, some of which are engaged in production for interstate commerce,—there being no obligation, however, on the petitioners to supply such plants with service This is the first time this question has ever been presented to this Court; and never before has the determination as to whether an industry is subject to federal regulation and to the terms of the Act been made to depend not upon what the industry itself does, but upon what its customers and patrons may do. Such a method of determining jurisdiction is wholly inconsistent with the principles recently approved by this Court in *McLeod v. Threlkeld*, 319 U. S. 491 (1943) and *Higgins v. Carr Bros. Co.*, 317 U. S. 572 (1943). This Court held, many years ago, that the business of local public passenger transportation was not subject to federal regulation under the commerce clause of the Constitution of the United States, *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21 (1904); and that holding is now ignored by the decision of the Court below. Indeed, the

result so achieved is contrary not only to the prior ruling of the Board itself as to the petitioners herein, but also to decisions of the Board in similar cases such as *Yellow Cab and Baggage Co.*, 17 N. L. R. B. 469; *San Diego Ice & Cold Storage Co.*, 17 N. L. R. B. 422; and *Cactus Mines Co.*, 21 N. L. R. B. 677.

The lower Court in its opinion, relying upon the language of this Court in *Wickard v. Filburn*, 317 U. S. 111 (1942), has indicated that it is not necessary for the employer's activity to have a direct effect upon interstate commerce, provided it does exercise "a substantial economic effect" thereon. Thus, the Court below utilized a statement by this Court, in a case involving the Agricultural Adjustment Act of 1938, to nullify the settled doctrine applied in this Court's prior decisions construing the National Labor Relations Act. We believe this Court should clarify the situation, and should settle the question as to whether the rule in the *Jones & Laughlin* and other Labor Relations Act cases, that the effect on interstate commerce must be immediate, close and intimate, not indirect or remote, in order to give the Board jurisdiction, still is the law.

2. The subsidiary reasons advanced by the Board and by the Court below in support of jurisdiction are predicated upon principles never recognized by this Court. The doctrine that local purchases of power, and of materials and supplies "originating" outside of the State, place a purchaser in interstate commerce, or cause him to affect commerce to a degree authorizing federal regulation, so completely ignores all the prior determinations by this Court that when a journey across a state-line ends interstate commerce terminates, as to require this Court to review the decision of the Court below. A similar question

which should be reviewed is the effect, if any, of purchases from time to time of equipment and supplies by petitioners outside of the State, and thereafter used and consumed in their own business.

The determination by the Board and by the lower Court that such activities as the sale of advertising space in the petitioners' vehicles, the local transportation of such articles as newspapers or a few sacks containing mail (under compulsion of federal law), or the operation of local vehicles on routes near railroad depots or wharves, constitute or affect interstate commerce is plainly inconsistent with the adjudicated cases, and should be reviewed.

3. This case involves an important question affecting the Board and other administrative agencies, to wit: (a) whether the Board has power to reverse its own prior ruling that it lacks jurisdiction over petitioners, which had been in effect for more than five years; or, (b) whether the Board, if it has such power, may enter an order based on findings of violations occurring during the period when its ruling that the Act did not apply was in full force and effect. In this case the Board has attempted to apply remedies retroactively. There is no case supporting such action. The Board has declined to be bound by the principle of equitable estoppel, and the lower Court has confused the issue by deciding that "there is nothing unreasonable in requiring the company to take action to undo the effect of unfair labor practices allowed to continue after that date" (referring to June 2, 1942, the date of the issuance of the complaint), and then having said this, by approving the action of the Board in applying remedies for alleged unfair labor practices before that date. The question as to whether the Board may rule two ways, and then impose retroactive requirements so as to nullify its first ruling

ab initio, to the detriment of those who rightfully relied thereon, should be considered and determined by this Court.

4. That part of the decision of the lower Court which enforces the checked-off union dues reimbursement provision of the Board's order is in conflict with twelve decisions in five circuits on a like question,[2] and goes far beyond the limiting principles on which such an order was upheld by this Court in *Virginia Electric & Power Co. v. N. L. R. B.*, 319 U. S. 533, (1943), where there was a closed shop, and where this Court approved reimbursement because of the particular facts of that case.

5. That part of the Board's order, enforced by the lower Court, requiring petitioners to post notices that their employees are free to remain members of or join two designated unions is in conflict with numerous decisions of other Circuit Courts of Appeals,[3] wherein such action by the Board has been uniformly held invalid because it implies a restriction on choice of union affiliation. This is an important question which has not been, but should be, settled by this Court.

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[2] *Western Union Telegraph Co. v. N. L. R. B.*, 113 F(2d) 992; *Corning Glass Works v. N. L. R. B.*, 118 F(2d) 625; *N. L. R. B. v. West Kentucky Coal Co.*, 116 F(2d) 816; *N. L. R. B. v. U. S. Truck Co.*, 124 F(2d) 887; *N. L. R. B. v. Gerity Whitaker Co.*, 137 F(2d) 198; *N. L. R. B. v. J. Greenebaum Tanning Co.*, 110 F(2d) 984; *A. E. Staley Mfg. Co. v. N. L. R. B.*, 117 F(2d) 868; *Reliance Mfg. Co. v. N. L. R. B.*, 125 F(2d) 311; *Kansas City Power & Light Co. v. N. L. R. B.*, 111 F(2d) 340; *N. L. R. B. v. Southwestern Greyhound Lines*, 126 F(2d) 883; *N. L. R. B. v. Continental Oil Co.*, 121 F(2d) 120; *N. L. R. B. v. Atlas Press Co.*, 11 L. R. R. 519.

[3] *N. L. R. B. v. Weirton Steel Co.*, 135 F(2d) 494; *N. L. R. B. v. Baldwin Locomotive Works*, 128 F(2d) 39; *Westinghouse Electric & Mfg. Co. v. N. L. R. B.*, 112 F(2d) 657; *Roebling Employees Assn., Inc., v. N. L. R. B.*, 120 F(2d) 289; *Colorado Fuel & Iron Corp. v. N. L. R. B.*, 121 F(2d) 165; *Reliance Mfg. Co. v. N. L. R. B.*, 125 F(2d) 311; *N. L. R. B. v. American Rolling Mill Co.*, 126 F(2d) 38; *N. L. R. B. v. Precision Castings Co.*, 130 F(2d) 639; *N. L. R. B. v. New Idea, Inc.*, 133 F(2d) 195; *N. L. R. B. v. Cleveland-Cliffs Iron Co.*, 133 F(2d) 295; *N. L. R. B. v. Harbison-Walker Refractories Co.*, 135 F(2d) 837; *N. L. R. B. v. Standard Oil Co.*, 138 F(2d) 885; *N. L. R. B. v. Elizabeth Arden, Inc.*, 139 F(2d) 488.

6. The order of the Board is not supported by substantial evidence, particularly in respect to alleged violations of Section 8 of the Act. The action of the trial examiner, in his rulings on evidence, his and the Board's attorneys' attitude toward petitioners' witnesses, and in attempting to minimize and destroy petitioners' evidence, resulted in a denial of a fair hearing and of due process of law.

7. The correct interpretation and application of the prohibitory provisions of the National Labor Relations Board Appropriation Act, 1944, has not been, but should be, settled by this Court. The Board has indulged in various interpretations, staying or dismissing some complaint cases, and attempting to proceed with others, despite the Congressional mandate. The Board seeks to make the word "complaint" used by Congress synonomous with the word "charge", thus giving the provisions an interpretation entirely different from the clear meaning of the language used. It is important that this Court end this confusion.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fourth Circuit, and submit herewith their brief in support of this petition.

Respectfully submitted,

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Dated: February 28, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

THE BALTIMORE TRANSIT COMPANY AND THE BALTIMORE COACH COMPANY,

Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The aforegoing petition for a writ of certiorari sufficiently sets forth references to the opinion of the Court below and the findings and order of the Board; the grounds upon which jurisdiction is invoked; the statutes involved; a concise statement of the case, and the questions presented. The questions involved are discussed herein in the order in which they appear in the petition.

ARGUMENT

I.

THE NATIONAL LABOR RELATIONS ACT DOES NOT APPLY TO PETITIONERS. (Questions Nos. 1, 2, 3 and 4.)

Petitioners, at the time of the hearing before the Board's trial examiner, operated daily a total of 1,253 vehicles, including street cars, trackless trolleys and buses (R. I, 162). Competition in the business of public transportation of passengers for hire was provided by nearly 1,000 taxicabs (R. I, 182), by 8 gasoline buses operating on the Fayette Street line in Baltimore (R. I, 157), and by a few other bus lines operating between points in the city and outlying sections (R. I, 183). Petitioners, as in the case of competitive taxicab and bus services, are under the jurisdiction of the Public Service Commission of Maryland, and all rates and character of service are subject to its supervision and approval. Petitioners are not part of or in any way connected or integrated with any power company or other industry engaged in interstate commerce, and to that extent their operations are immediately and completely distinguished from the street railway public passenger services considered by this Court in *N. L. R. B. v. Virginia Electric and Power Company*, 314 U. S. 469, which services were operated as a unit or division of a power company engaged in interstate commerce, and where there was one union of employees of all divisions thereof.

The Board has not attempted to exercise jurisdiction over petitioners' competitors, as is evidenced by its adherence to its ruling that it has no jurisdiction over and that the Act does not apply to local public passenger transportation services such as taxicabs. *Yellow Cab and Bag-*

gage Company, 17 N. L. R. B. 469. And, as stated in the petition, until the order in this case was entered by the Board on February 1, 1943 (R. I, 1), it had construed the Act as inapplicable to petitioners who are engaged exclusively in the business of wholly intrastate public transportation of passengers for hire. In making its first ruling that the Act did not apply to petitioners, (Regional Director, September 29, 1937, R. II, 801, 1219; and, on appeal, the Board, April 29, 1938, R. II, 1220) the Board had before it this Court's decision in *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, decided April 12, 1937. The Board, presumably, was guided by the definitions and limitations set forth in this Court's opinion therein, and gave effect to the statement that the Act may not be construed so as to give the Federal government supervision over the internal concerns of a State. In this case, however, the Board has departed from the area of jurisdiction defined by this Court, and is attempting to extend its authority over operations which do not affect interstate commerce in a "close and intimate" fashion, which do not bear a substantial relationship thereto, and the effects of which thereon are so indirect and remote that the assumption of federal authority obliterates the distinction between what is national and what is local, and creates a completely centralized government. There is no escape from this.

The Board's jurisdiction over petitioners is rested by the trial examiner on several grounds (R. I, 32), all of which are adopted by the Board by reference (R. I, 2), although the principal emphasis in the Board's decision, and in the opinion of the Court below is upon only one of said grounds and a number thereof are not mentioned in the lower Court's opinion. These several grounds will now be considered.

Transportation of Workers To and From Industrial Plants

The primary basis for federal jurisdiction advanced by the Board is that "among the passengers carried on respondents' (petitioners') transportation system are substantial numbers of employees going to and from their work in industrial plants in and around Baltimore". However, petitioners do not know the destination of any of their passengers, or the business in which they may be engaged. Petitioners do not have contractual obligations with industrial plants to transport passengers to or from them. The choice of their means of transportation is made by the workers and not by the owners of the plants. Workers may use petitioners' system, other bus lines, taxicabs, hired automobiles, their own or their neighbors' cars, or they may walk. It is just as incorrect to say that industrial plants or other enterprises engaged in interstate commerce are dependent, in any legal sense, upon the transportation facilities of petitioners as it would be to say that such industrial plants are dependent upon the ice, milk and coal companies, the bakeries and groceries, and the doctors and dentists, who provide the workers with supplies or services without which they may not appear for work on time or at all. The principles applied in *McLeod v. Threlkeld*, 319 U. S. 491 (1943), under the Fair Labor Standards Act, 29 U. S. C. A. 201-219, are pertinent, as is *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21. Upon the facts of this case the Act cannot be applied to petitioners under the decisions of this Court in *Schechter v. United States*, 295 U. S. 495, and *Carter v. Carter Coal Co.*, 298 U. S. 238. The cases relied upon by the Board, *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197; *N. L. R. B. v. Bank of America Nat. Trust & Savings Assn.*, 130 F. (2d) 624; *N. L. R. B. v. Bradford Dyeing Assn.*, 310 U. S. 318;

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453; *Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B.*, 101 F. (2d) 841, 308 U. S. 241; *N. L. R. B. v. Hudson Co.*, 135 F. (2d) 380; and *Butler Bros. v. N. L. R. B.*, 134 F. (2d) 981, are not in point, because the employers therein involved were engaged in interstate commerce, or were in the stream of commerce, as part of the outward or inward flow thereof preceding or subsequent to manufacture or sale. *Kirschbaum v. Walling*, 316 U. S. 517, is not applicable because there the services and facilities involved were necessary in the production of goods for commerce, and were contracted for and relied on by industries engaged in interstate commerce. Nor is *Wickard v. Filburn*, 317 U. S. 111, applicable. In that case the farmer who raises wheat for local consumption was declared to affect, and even to be part of the national economy, but petitioners' wholly local transportation system does not compete with or form any part of interstate transportation or any other interstate activity, and in no way affects the national economy. The decision in this case not only reverses prior administrative construction with respect to transportation and other local services and operations, it also nullifies all contemporaneous legislative construction in the passage by the States of New York, Pennsylvania, Massachusetts, Wisconsin, Utah, Rhode Island, Minnesota and Michigan of state labor relations acts, all of which will become useless for all practical purposes unless the decision herein is reversed.

Purchase of Materials "Originating" Outside the State

It was found that petitioners purchased gas and oil in Baltimore, from local dealers, and that such gas and oil originated at some time outside the State. The lower

Courts' theory that such purchases affect interstate commerce within the meaning of the Act is an unwarranted attempt to extend principles approved in the decisions of this Court as determinative of the jurisdiction of the Board, beginning with *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1. And the suggestion that an article retains its interstate character after the journey into a State is over, and after it has passed through one or more hands, so that purchases from importer, jobber, wholesaler, retailer, and so on to the ultimate consumer are transactions in or affecting interstate commerce is in direct conflict with all adjudicated cases to date. *Schechter v. United States*, 295 U. S. 495. *Walling v. Goldblatt*, 128 F. (2d) 778, cert. denied, 318 U. S. 757. *Schroepfer v. Abell Co.*, 138 F. (2d) 111, cert. denied, January 17, 1944. Since there are few things used by individuals which do not "originate" in whole or in part outside of the State in which they reside, it would seem that the idea advanced by the Board and approved by the lower Court would carry the federal power over every conceivable commercial activity, and terminate the last vestiges of State authority. This is true because practically every individual in his every day activities uses articles, all or part of which originated outside of the State wherein he resides, and he could not function in any capacity without being subject, directly or indirectly, to such regulations as Congress might choose to impose. The Board and lower Court found that petitioners' activities affected commerce because they purchased in 1940 and 1941 street cars, buses, trolley coaches and other equipment and materials from points outside the State (R. I, 37, 154, 155). The amount and character of these purchases vary greatly from year to year. Since they are used and consumed by petitioners in their own business, there is no flow of commerce preceding manufacture or sale, and there is no evidence what-

ever in the record that industrial strife on petitioners' system could or would result in substantial interruption to or interference with such purchases.

Services Allegedly Connecting With Interstate Carriers

The finding that petitioners' services connect with interstate carriers (R. I, 37), has no factual basis whatever. On the contrary, the record clearly shows that petitioners' operations are in no way integrated with nor do they maintain connecting schedules with such carriers (R. III, 11, 12). Petitioners' operations, considered with respect to the operations of such carriers, are separate and wholly local and being so are analogous to the situation before this Court in *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21.

Abandonment in 1935 of Charter Service

Another ground is labeled "the abortive attempt to evade federal jurisdiction by the discontinuance of the interstate bus service." (R. I, 38). There is no basis for this finding, and it was not mentioned by the lower Court. Prior to 1935 (not 1937, as erroneously stated by the trial examiner) the predecessor company occasionally chartered buses for trips out of the State. The business was small and unprofitable and was abandoned at the time that the company was reorganized, almost nine years ago (R. I, 553).

Transportation of Mail

Petitioners carry a small number of sealed pouches of mail from the local Post Office to points in the city and vicinity, (R. I, 194), and do so, not as a part of its business, but solely under compulsion of the Act of Congress of July, 1918, Title 39, Section 571. *N. L.*

R. B. v. Idaho-Maryland Mines Corp., 98 F. (2d) 129. This is only incidental, and the total gross revenue for the mail service during 1941 was $1,100, or .0000743 per cent. of petitioners' total operating revenues.

Transportation of Newspapers

The record discloses without dispute that petitioners' activities in transporting newspapers are limited to the transportation of newspapers printed in the City of Baltimore and carried within its limits for local distribution, (R. I, 194), a situation which could not possibly bring the activities of petitioners within the application of the Act. Any idea that the local transportation of newspapers is or affects interstate commerce seems to be answered by the lower Court's opinion in *Schroepfer v. Abell Co.*, 138 F. (2d) 111, cert. denied, January 17, 1944.

Display of Advertising

Advertising is displayed in petitioners' vehicles, but the record discloses that petitioners do not solicit or sell advertising. They sell space for advertising in their vehicles to one concern, Transitads, Inc., and much of the space is used for advertising local products and events (R. III, 252, 253). The lower Court made no mention of advertisements.

Purchase of Electric Energy

The record shows that all of the electricity used by petitioners is purchased within the State of Maryland. Petitioners buy all of their electric power from the Consolidated Gas, Electric Light and Power Co. of Baltimore. In 1941 petitioners bought about 138 million kilowatt hours. During the same year Consolidated produced about one billion, 390 million kilowatt hours at its generating plants in the City of Baltimore (R. III, 24, 25), so that petitioners'

purchases were less than one-tenth of the Consolidated's local production. During the same year Consolidated purchased in Maryland from other companies about 899 million kilowatt hours.

The record does not show that any outside energy reached petitioners, (R. I, 296). The Federal Power Commission stated that it was difficult to determine that fact (R. II, 861, 862), and no determination was made in this case. Therefore, there is no tangible foundation for the assumption, made by the Board and the lower Court, that some of the energy used by petitioners "originated" outside of the State, but, in any event, it is undisputed that all such energy, if it ever reached them, passed through several ownerships within the State prior to any assumed purchase by and delivery to petitioners. And such purchases were not in and do not affect interstate commerce. *Missouri, ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165.

We believe it is clear that none of the grounds advanced by the Board and the Court below for holding that the Act applies to petitioners, is, when considered alone, sound and tenable; and, of course, the aggregate thereof can have no different legal effect in this respect than can each of the points when considered separately. We, therefore, submit that there was no justifiable basis for the action by the Board and the lower Court in adding together these various aspects of petitioners' wholly intrastate activities and then finding, mainly because of the size of petitioners' business and its location in one of the larger cities of the country, that the operations affect interstate commerce in such a sense as to bring them within the Act.

II.

THE BOARD'S COMPLAINT AND ORDER ARE BARRED BY THE DOCTRINE OF ESTOPPEL

(Question No. 5.)

(a) res judicata

On August 6, 1937, the Transport Workers of America (C. I. O.) filed a charge against The Baltimore Transit Company, which owns and operates petitioners' mass transportation system, alleging unfair labor practices in violation of the Act, and specifically of Section 8 (1) and (3). The charge was filed with the Board's Regional Director for the fifth region (R. II, 799, 800). The Regional Director has full power and authority to investigate all charges filed with him, and no charge may be withdrawn without his or the Board's consent (Sec. 11 of the Act; Board's Rules and Regulations, Article II, Sec. 1-4, Article IV, Sec. 1). The Regional Director made a thorough investigation (R. II, 801), conferring with counsel for petitioners, and being given requested information concerning petitioners' activities (R. III, 453, 454). Petitioners contended that the Act did not apply and that the Board lacked jurisdiction. On September 29, 1937, the Regional Director notified petitioners he was "compelled to dismiss the charge for lack of jurisdiction" (R. II, 801). The Union was notified it had the right to file exceptions or to appeal from this ruling to the Board. The appeal was taken, and on April 29, 1938, the Board affirmed the Regional Director and notified the Union what had been done (R. II, 1220). Since the Union's charge was dismissed, the Board's order was final, and, therefore, was reviewable in the appropriate circuit court of appeals (Sec. 10 (f) of the Act). But no petition by any person aggrieved by the order was filed. The Board is the only tribunal with power to make an original determina-

tion as to whether it has jurisdiction and whether the Act applies, and until the Board makes that determination, there is no way in which the issue can be determined by the courts. This Court has held that the only adversary parties under the Act are the Board and the employer complained against. *Amalgamated Utilities Workers v. Consolidated Edison Co.*, 309 U. S. 261. The parties in this case are the same as they were in 1937 and 1938, when the Regional Director and the Board first decided the question of jurisdiction. The record shows there have been no changes in the character of petitioners' business since the Regional Director and the Board decided that the Act does not apply (Board Exhibits 13-17 inc.; par. 1, 2 and 3 of Complaint, R. II, 786, 787; purchases and revenues, R. I, 194, 252, 485-488). The principles of res judicata apply to questions of jurisdiction, *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 78, and the doctrine has been applied repeatedly against agencies of the United States. *Tait v. Western Maryland Ry. Co.*, 289 U. S. 620, 624; *Noble v. Union River Logging R. R. Co.*, 147 U. S. 165; *Lane v. Watts*, 234 U. S. 525; *Brougham v. Blanton Manufacturing Co.*, 243 Fed. 503. And a Circuit Court of Appeals permitted the Board to reopen a case only because in that case the order of dismissal contained an express reservation of the right to reinstate. *Conn, Ltd., v. N. L. R. B.*, 108 F. (2d) 390, 392. The Board's general and approved practice in other cases is to make reservations where it desires to retain the right to reconsider, and omit them where it desires to make its orders final and binding. *San Diego Ice and Cold Storage Co.*, 17 N. L. R. B. 422; *Yellow Cab and Baggage Co.*, 17 N. L. R. B. 469, where the orders were without prejudice to reconsider; *Cactus Mines Co.*, 21 N. L. R. B. 677, where reservation was omitted; *Protective Motor Service*, 8 N. L. R. B. 309, where the Board reserved the right to take further proceedings; same case, 21 N. L. R. B. 552, where the

Board dismissed the proceedings without any reservation. The courts have recognized this practice with respect to the Board. *Semet-Solvay Co. v. N. L. R. B.*, 100 F. (2d) 1020, where Board's decision was vacated and set aside with prejudice. There can be no dispute that if the Board made a mistake in this case in dealing with the issue of jurisdiction, the remedy was by petition for review, but none was filed. *Jackson v. Irving Trust Co.*, 311 U. S. 494. Here the tribunal clothed with power to make the decision made it without reservation, and the decision binds the United States as well as petitioners. *Sunshine Anthracite Coal Co. v. Atkins*, 310 U. S. 381, 403, 404. It is submitted that the Board has no power in this case to reverse its prior ruling that it lacks jurisdiction over petitioners.

(b) equitable estoppel

In any event, the Board is estopped from making any finding that the petitioners violated the Act during the period when its ruling that the Act did not apply was in effect, and from basing any order thereon against petitioners. The ruling made by the Regional Director and affirmed by the Board gave petitioners a complete exemption from compliance with the Act. They could not in good faith be held accountable for violations of the Act during the time when the determination that the Act did not apply to them remained in effect. And none of the acts of the petitioners during such period of time, although thereafter adjudged by the Board to be unfair labor practices, were unlawful if the Act did not apply to petitioners.

The Board's order of February 1, 1943, invalidates the written contracts between petitioners and the Independent Union executed in January, 1942; it imposes heavy monetary obligations on petitioners by requiring them to reinstate ten discharged employees, with seniority rights and

privileges, to reimburse nine of them for any loss of earnings, and to refund dues checked off from the pay of employees who were members of the Independent Union. Because of its prior contrary ruling, the Board does not order petitioners to make any reimbursement prior to June 2, 1942, the date when the complaint was filed. The Board does this on the ground that the filing of the complaint put the petitioners on notice that its prior determination was no longer in effect (R. I, 5), thus conceding that the prior ruling was effective, at least until June 2, 1942. There is no sound theory of law under which the Board or any other administrative agency may apply remedies retroactively over the period when the act giving jurisdiction was not in effect or did not apply. *Helvering v. Reynolds Tobacco Co.*, 306 U. S. 110. See also *U. S. v. Alabama R. R.*, 142 U. S. 615. The Board cannot now find that the Act prohibited petitioners from discharging certain of its employees during the period when the Act, according to the Board's ruling, did not apply to petitioners; and the Board cannot now reverse its earlier ruling and proceed to the detriment of petitioners as if the ruling had never been made. Such a procedure violates every principle of fair dealing. Moreover, such action is in no sense remedial or preventive in character. It is unmistakably punitive and, therefore, in excess of the Board's power to make. The Court below seems to have missed the point entirely when it held the Board may take action to undo the effect of unfair labor practices allowed to continue after the complaint was filed. The point is that all of the alleged unfair labor practices charged in the complaint occurred *prior* to the date of the complaint, and therefore during the period when the Act was held not to apply and there could be no unfair labor practices. Inasmuch as the Board's order is based on findings of unfair labor practices during the period when petitioners were actually held not

subject to the Act, the order disregards the principles of equitable estoppel, is essentially punitive, and should be set aside.

None of the cases cited by the Board and by the lower Court in its opinion is authority for the Board's order in this case. Certainly *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F. (2d) 155, 162, cert. denied, 315 U. S. 806; *Federal Communications Com. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 145; *Houghton v. Payne*, 194 U. S. 88, 100; and *Jacobsen v. N. L. R. B.*, 120 F. (2d) 96, are not. The *Houghton v. Payne* case made it clear that a change in the administrative construction of a statute could not be made retroactively. The principles approved in such cases as *Federal Trade Com. v. Paladam Co.*, 316 U. S. 149; *United States v. City and County of San Francisco*, 310 U. S. 16, 32; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409; *United States v. City of Greenville*, 118 F. (2d) 963, 966; and *American Surety Co. of New York v. United States*, 112 F. (2d) 903, 906, are not relevant here. These cases authorize the United States to proceed where there has been a change in the facts upon which earlier rulings were based; where the officials had previously acted without authority, or acted illegally, or attempted to authorize illegal acts.

The Board is authorized to make the jurisdictional determination; the jurisdictional facts on which the Board's order is based are the same now as they were when the prior contrary ruling was made. If the Board has jurisdiction over petitioners, it must exercise that jurisdiction *after* and not *before* the Act takes effect as to petitioners' and that date in this case would be February 1, 1943, when the Board reversed its prior ruling. The Board is estopped from finding violations before the date when under its rul-

ing the Act first became applicable to petitioners, assuming that petitioners are now subject to the Act, and assuming that the Board can reverse its prior contrary ruling.

III.

THE BOARD'S ORDER IS INVALID (Question No. 6.)

The Board's Order is invalid for the following reasons:

(a) The Board's order requires petitioners to reimburse its employees who were members of the Independent Union for checked off dues, although petitioners never had any closed shop or maintenance of membership agreement with the Union (Board's Exhibit No. 71). The by-laws of the Union contained provisions for employees who did choose to join within 60 days of employment (R. II, 894). A number of employees who did join chose to pay their dues directly to the Union by check or cash, and chose not to participate in the check-off (R. I, 244). There was no compulsion to join the Union, or to remain in the Union, and the record shows conclusively that its members were free to pay their dues in any manner they selected. The Board's order is contrary to twelve decisions by Circuit Courts of Appeals, set out in Note 2 of the petition herein, *ante*, page 12. The order for reimbursement approved in *Virginia Electric & Power Co. v. N. L. R. B.*, 319 U. S. 533, involved a contract establishing a closed shop. This Court said that the order for reimbursement was valid because of the facts in that particular case. The situation here is entirely different, and the Board is without authority to stretch that decision to cover the circumstances disclosed by the record here.

(b) The requirement in the Board's order that notices designating by name certain unions which employees are free to join or remain in as members has been held invalid

in many cases set forth in Note 3 of the petition herein, *ante*, page 12. There is no ruling to the contrary, and the Board and the Court below simply ignored the adjudications on this point.

(c) The order requires petitioners to reinstate with seniority and other privileges employees discharged prior to June 2, 1942, the date when the complaint was filed, although, as pointed out, the discharges occurred when the Board's ruling that the Act did not apply was in effect. Petitioners have been ordered to reimburse employees for loss of earnings and for checked off dues after June 2, 1942, although the Board's order reversing its prior ruling of lack of jurisdiction was not issued until February 1, 1943. The Board contends, with the lower Court's approval, that the issuance of the complaint gave petitioners notice that the prior ruling of lack of jurisdiction was no longer in effect. But this contention is not sound. The issuance of the complaint could not be determinative of jurisdiction. This Court has said that a complaint merely sets in motion the machinery of an inquiry. *N. L. R. B. v. Indiana and Michigan Electric Co.*, 318 U. S. 9.

(d) Detailed discussion of petitioners' contention that the findings by the Board of unfair labor practices are not based on substantial evidence would make this brief unduly lengthy. The findings of unfair labor practices were adopted by the Board by reference to the findings of the trial examiner, and a reading of his intermediate report shows that the results were obtained by accepting as true all of the testimony given on behalf of the Board, despite, in many instances, as the record discloses, the unreliable and uncorroborated nature of such testimony, and its inconsistency with other testimony given by the same witnesses on cross examination. Many of the findings are based on

unwarranted inference and pure speculation, and not on evidence. *N. L. R. B. v. Fansteel,* 306 U. S. 240.

(e) Petitioners did not receive a fair hearing. Important testimony was excluded, petitioners' witnesses were abused and insulted by the trial examiner and the Board's attorneys (see petitioners' exceptions Nos. 168 to 191, filed with the Board and included in the certified record in this case). Petitioners were denied due process of law, and the proceeding violates the principles approved in *Donnelly Garment Co. v. N. L. R. B.,* 123 F. (2d) 215; *Morgan v. United States,* 304 U. S. 1; *N. L. R. B. v. Indiana & Michigan Electric Co.,* 318 U. S. 9; *N. L. R. B. v. Washington Dehydrated Food Co.,* 118 F. (2d) 980, and other cases in which similar incidents were considered.

IV.

THE BOARD IS PROHIBITED BY CONGRESS FROM PROSECUTING THIS CASE (Question No. 7.)

Petitioners filed a motion in the lower Court to stay these proceedings because the Board was prohibited by an act of Congress, Title IV of Public Law 135 of the 78th Congress, approved July 12, 1943, cited as "National Labor Relations Board Appropriation Act, 1944", from prosecuting its petition for enforcement. This Act provides that no part of appropriated funds shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed. One of the primary objectives of the complaint in this case is to nullify the agreements between petitioners and the Independent Union; to prohibit any new agreements, and to disestablish the Independent Union as the bargaining agent for its members in the

making of contracts with petitioners. The motion and the affidavit supporting the motion (R. III, 493-519) show that the contracts involved in this case were executed on January 1, 1942, and January 18th, 1942. The complaint in this case was filed on June 2, 1942, (R. II, 786), and the charge on which the complaint was based was filed the preceding day, June 1, 1942, (R. II, 795). The contracts were in existence longer than three months without complaint being filed. Authority in such cases was withdrawn from the Board by Congress, and the Board was without power to prosecute its petition for enforcement in the lower Court. *Dickerson v. United States,* 310 U. S. 554. The disability is still in effect. The Board contended below that the phrase "without complaint being filed" should be construed so as to mean "without charge being filed," thus extending the application of the prohibition from complaints filed by the Board to include charges which may be filed by any person with the appropriate Regional Director. In view of the fact that the Board and its Regional Directors are not required to advise employers of such charges, the interpretation suggested by the Board would make it impossible for any employer subject to the Board's jurisdiction to know whether his contract was immune from or subject to attack. It would render the prohibitory act meaningless, and open the way to destroy the purpose for which it was passed. The Board has stayed or dismissed some proceedings, and has prosecuted others (R. III, 519). It was error by the lower Court to deny the motion and thus decline to give effect to this clear mandate from Congress.

CONCLUSION

It is submitted that the petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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Dated: February 28, 1944.

APPENDIX

NATIONAL LABOR RELATIONS ACT (49 STAT. 449, 29 U. S. C. 151, *et seq.*).

* * * * * *

Definitions.

Sec. 2. When used in this Act—

* * * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * *

Prevention of Unfair Labor Practices.

Sec. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

* * * * * *

Investigatory Powers.

Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

* * * * * *

RULES AND REGULATIONS.

(Series 2, as amended, published in the Federal Register July 14, 1939, January 27, 1940, March 13, 1940, April 22, 1941 and September 6, 1941.)

ARTICLE II.

Procedure Under Section 10 of the Act for the Prevention of Unfair Labor Practices.

Charge.

Section 1. A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person or labor organization. A

charge may be withdrawn only with the consent of the Regional Director with whom such charge was filed or of the Board. Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the Regional Director issuing the complaint, by the Trial Examiner designated to conduct the hearing, or by the Board.

Sec. 2. Except as provided in Section 36 of this Article, such charge shall be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. * * *

* * * * * *

Complaint.

Sec. 5. After a charge has been filed, if it appears to the Regional Director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the "parties") a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a Trial Examiner at a place therein fixed and at a time not less than ten days after the service of the complaint. A copy of the charge upon which the complaint is based shall be attached to the complaint. * * *.

* * * * * *

Sec. 9. If, after the charge has been filed, the Regional Director declines to issue a complaint, the person or labor organization making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director. This request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

* * * * * *

ARTICLE IV.

Designation of Regional Directors, Examiners, and Attorneys as Agents of the Board.

Section 1. All Regional Directors now or hereafter in the employ of the Board are herewith designated by the Board as its agents:

(a) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(b) To investigate concerning the representation of employees (including the taking of secret ballots of employees) and conduct hearings in connection with such investigations, in accordance with Section 9(c) of the Act.

(c) To issue and cause to be served complaints, to amend complaints, and to conduct hearings upon such complaints, in accordance with Section 10(b) of the Act.

(d) To have access to and the right to copy evidence, to administer oaths and affirmations, to examine witnesses, and to receive evidence, in accordance with Section 11(1) of the Act.

Labor-Federal Security Appropriation Act, 1944 (Act of Congress, Approved July 12, 1943, Public Law 135—78th Congress, Chapter 221—1st Session). Title IV, National Labor Relations Board Appropriation Act, 1944.

* * * No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: *Provided*, That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person.

No. 785.

In the Supreme Court of the United States

OCTOBER TERM, 1943.

THE BALTIMORE TRANSIT COMPANY AND THE BALTIMORE COACH COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

INDEX

CITATIONS

Cases—Continued. Page

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. III, 526–538)[1] is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 1–152) are reported in 47 N. L. R. B. 109.

[1] In referring to the record, the same method is used as that followed in the petition for certiorari (Pet. 2, n.). Thus, the two volumes printed by the Board as an appendix to its brief in the court below are referred to as R. I, and R. II, respectively, and the volume printed by petitioners as an appendix to their brief in the court below, in which are also contained the supplemental proceedings in that court, is referred to as R. III.

JURISDICTION

The decree of the court below (R. III, 538–539) was entered on January 10, 1944. The petition for a writ of certiorari was filed on February 28, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the unfair labor practices of petitioners, who operate the only street railway and bus transportation system in Baltimore and in the course of their business import in interstate commerce substantial quantities of goods, affect commerce within the meaning of the Act.

2. Whether the Board is without power to remedy and restrain certain unfair labor practices in which petitioners engaged, because several years before commencement of the instant proceedings the Board refused, for asserted "lack of jurisdiction" over petitioners' business, to issue a complaint against petitioners upon charges alleging unfair labor practices not here in issue.

3. Whether, in view of the Board's earlier refusal to assume jurisdiction over petitioners, the Board abused its discretion in using the date of the issuance of its complaint to start the running of petitioners' liability for back pay and reimbursement of dues rather than the date of the decision and order.

4. Whether there is substantial evidence to support the Board's findings that petitioners interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) of the Act; interfered with, dominated, and supported two successive labor organizations of their employees, in violation of Section 8 (2) of the Act; and discouraged membership in two other named labor organizations by discriminating as to the hire and tenure of 10 employees, in violation of Section 8 (3) of the Act.

5. Whether, in the circumstances of this case, the Board abused its discretion in ordering petitioners to reimburse their employees for moneys checked off from their wages as dues to one of the company dominated and supported labor organizations.

6. Whether the Board abused its discretion in ordering petitioners to post notices that their employees are free to become or remain members of the specified labor organizations, membership in which petitioners had attempted to discourage, and that petitioners will not discriminate aganst the employees because of membership or activity in those organizations.

7. Whether, in the circumstances of this case, petitioners were denied a fair hearing because of the conduct of the Board's attorneys and the trial examiner who presided at the hearing at which the evidence in the case was taken.

8. Whether the court below was precluded from granting enforcement of the Board's order because of a proviso to the Board's appropriation for the current fiscal year which prohibits the Board from using any of its funds in connection with certain cases.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Labor-Federal Security Appropriation Act, 1944, are set forth in the Appendix, *infra,* pp. 29–34.

STATEMENT

On August 6, 1937, Transport Workers Union of America, C. I. O., filed a charge with the Board's appropriate regional director alleging that the Baltimore Transit Company had discriminatorily discharged one Brylke, in violation of Section 8 (1) and (3) of the Act (R. II, 799–801). On September 29, 1937, the regional director wrote the Company that he had decided to dismiss the charge for "lack of jurisdiction" (R. II, 801, 1219). On April 29, 1938, the assistant secretary of the Board advised the Transport Workers Union by letter that the Board had affirmed the regional director's refusal to issue a complaint and that, therefore, no complaint on its charges would issue (R. II, 1220). No further proceedings were taken with respect to the charges.

On March 5, 1942, the Amalgamated Association of Street, Electric Railway, and Motor Coach Employees of America, Division 1300 (A. F. of L.), herein called Amalgamated or the Union, filed charges with the Board initiating the instant proceedings (R. II, 1178–1179), and on June 2, 1942, the Board issued its complaint herein (R. II, 786–794). Neither Brylke nor Transport Workers Union is involved in these charges or complaint. There followed the usual proceedings under Section 10 of the Act (R. I, 23–26, 1–2), and on February 1, 1943, the Board issued its findings of fact, conclusions of law, and order (R. I, 1–152). The facts as found by the Board and shown by the evidence may be summarized as follows:

I. Nature of petitioners' operations [2]

Petitioners are Maryland corporations which operate the street railway and bus transportation system serving Baltimore and its environs (R. I, 157, 573–574; R. II, 786–787, 802).[3] With negligible exceptions, they furnish the only mass transportation facilities in the entire Baltimore area (R. I, 157–158, 162–164, 182–184; R. II, 824–855, 856; Bd. Exh. 28). They operate 22 bus lines and

[2] The Board's findings respecting petitioners' operations appear at R. I, 2, 27, 29–40. In the following statement all references, unless otherwise indicated, are to the supporting evidence.

[3] One of the petitioners, the Baltimore Transit Company, wholly owns and controls the other petitioner, the Baltimore Coach Company (R. I, 573–574, R. II, 787, 802).

some 30 streetcar lines, which serve practically every district of the city (R. I, 162–164; Bd. Exh. 28). At the time of the hearing, petitioners had 1,253 vehicles in active use (R. I, 162). In 1941 these vehicles carried 160,050,906 revenue passengers and travelled 34,042,730 vehicle-miles, and during the first 4 months of 1942 they carried 64,488,591 revenue passengers and travelled 12,235,627 vehicle-miles (R. II, 824–855, 856).

Much of petitioners' traffic is intimately connected and integrated with the industrial life of the Baltimore area. During the morning rush hours petitioners carry daily approximately 100,000 passengers to outlying industrial areas and approximately 90,000 passengers to the heart of the city where wholesale and manufacturing districts are located (R. I, 179–181, 187; Bd. Exh. 56). A substantial proportion of these passengers consists of employees going to and from their jobs in great industrial and manufacturing concerns which are directly engaged in interstate and foreign commerce. Thus, of 147,000 employees of 47 of the largest business enterprises in Baltimore, each of which is engaged in interstate commerce and many of which are vital to the national war effort, 45,000 depend upon petitioners' transportation facilities to bring them to and from work. These concerns include shipyards, railroads, oil companies, steel works, canning works, tin mills, food packers, glass works,

electrical and radio manufacturers, telephone services, electric light and power plants, and clothing factories; they are responsible for bringing into the State of Maryland annually goods valued at over $271,000,000 and shipping out of the State annually goods valued in excess of $500,000,000.[4]

Petitioners' facilities also transport passengers to and from the wharves, stations, and airports of interstate carriers (R. I, 162–163, 165, 167, 182–183; Bd. Exh. 28). In connection with their operations, petitioners annually bring or cause to be brought into the State of Maryland from other States substantial quantities of materials and supplies. In 1941 petitioners' purchases of machinery and equipment from outside the State were $2,353,455.96 (R. I, 154–155), their purchases of gasoline and oil, all of which originated outside the State, amounted to 1,698,280 and 313,976 gallons, respectively (R. I, 485–488), and they used 138,381,291 kilowatt-hours of electricity which they purchased from a producer that obtained 39

[4] The Board's findings as to the number of employees of each of the 47 concerns appear at R. I, 33–34. The supporting evidence for the findings in the above paragraph appears at R. I, 190–193, 195–197, 199–201, 206–208, 219–221, 231–234, 238–240, 247–248, 253–258, 260–264, 287–288, 294–295, 298–308, 320–324, 362–365, 384–386, 400–401, 412–442; R. II, 881–882, 890–891, 897–898, 900, 1028–1029, 1031–1032, 1052–1054, 1058–1060, 1068–1070, 1076–1082, 1091–1104, 1106–1107, 1109–1111, 1113–1114.

percent of its output from outside the State (R. I, 248–249, 296–298; R. II, 861–862, 864, 1071, 1072, 1074, 1075).

Upon the foregoing facts, the Board found that petitioners' unfair labor practices affect commerce within the meaning of the Act (R. I, 2, 144).

II. The unfair labor practices [5]

From 1918 to 1937, petitioners maintained and supported a labor organization of their employees, known as the Association.[6] Petitioners sponsored the formation of the organization (R. I, 585–586; R. II, 903–906, 913); took an active part in formulating its governing rules, which were subject to petitioners' approval (R. II, 904–905, 907–912, 913, 915–919, 922); and directly participated in the organization's management through, *inter alia,* selection of its secretary, treasurer, and *ex officio* members of its governing committee (R. II, 917, 920). Petitioners also granted the organization direct and indirect financial and other assistance in the form of monthly contributions of from $1,000 to $2,500 (R. II, 917, 933, 941–942), a check-off system of dues collection whereby membership in the Association carried

[5] The Board's findings respecting petitioners' unfair labor practices appear at R. I, 1, 2–4, 41–144.

[6] Until 1935, the full name of the organization was the United Railways Employees' Association of Baltimore, and thereafter it was styled the Baltimore Transit Employees' Association (R. I, 226; R. II, 948, 950).

with it authorization to petitioners to deduct dues from the employees' wages (R. I, 244, 326; R. II, 1038–1039),[7] and free use of company time, property, facilities, and from time to time legal counsel (R. I, 203–204, 206, 216–217, 227, 246, 315, 343, 554, 586, 701, 705; R. II, 903, 935, 942, 944, 945, 953, 962, 966–968).

The Independent [8] succeeded the Association in 1937, following the *Jones & Laughlin* decision.[9] It was organized under the leadership of members of the governing committee of the Association and with petitioners' undisguised support and approval (R. I, 700–706; R. II, 957–959), to meet the "emergency" [10] created by the concurrent enrollment of members among the employees by unions affiliated with the C. I. O. and the A. F. of L. (R. I, 314, 551–552, 761; R. II, 957). Certain illegal features of the predecessor were eliminated from the governing rules of the Independent (R. II, 893–896; Bd. Exh. 72), but it

[7] Petitioners agreed to defray all "expenses of carrying on the Association" except insofar as defrayed by membership dues and fees (R. II, 917).

[8] Independent Union of Transit Employees of Baltimore City.

[9] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, decided April 12, 1937.

[10] The characterization is that of General Manager Potter, who, in addressing the governing committee of the Association following initial steps to form the Independent, stated that he was "proud" of the way they had reacted to an "emergency" (R. II, 959).

was emphasized to the employees that the new organization was merely a "successor" of the old, that the latter's assets would be transferred to the Independent, and that the "existing rights" of the employees in the Association would not be "jeopardized" (R. II, 899). Continuity between the two organizations was almost complete, as to business (R. II, 962–965), meetings (R. II, 959, 962, 970), leadership (R. I, 215–216, 700; R. II, 965, 970), and recognition (R. I, 705), and the successor carried on in substantially the same manner as had the predecessor (R. I, 706; R. II, 962, 965–966).

Petitioners granted the Independent direct and indirect financial and other support such as had been previously granted the Association. Presidents and certain other officers of the Independent ceased to perform their regular duties as employees of petitioners upon election to office and thereafter devoted their entire time to the affairs of the Independent, but petitioners continued to pay them their usual wages (R. I, 197–199, 201; cf., 229–230). Petitioners permitted the Independent and its officers and representatives to conduct its affairs and meetings on company time and property (R. I, 197–199, 201, 203–206, 214–215, 235–237, 243, 246, 313–314, 550, 554, 576, 586, 704–706, 745–746; R. II, 1046) and to use company facilities (R. I, 227, 228, 342–343, 730). Petitioners financed picnics, pleasure trips

for officers, lobbying before legislative bodies (R. I, 209–212, 240–241, 282–285, 746; R. II, 994, 1010), and continued the system of dues collection by pay-roll deductions (R. II, 894–895; Bd. Exh. 75A).

Petitioners manifested opposition to "outside" unions, used the employees' "representatives" under the Independent as their own agents in furthering petitioners' anti-union policies, and unequivocally showed that they intended the employees to continue to adhere to and support the Independent. Thus, when several employees instituted movements to abandon the Independent and joined "outside" unions, petitioners' highest officials quickly came to the defense of the Independent, castigated the dissidents as "judases" and "b——" who were trying to destroy "what we have built up here," granted purposeful wage adjustments, and otherwise showed a fixed determination that the employees retain the Independent (R. I, 707–709, 753–754, 759–760; R. II, 974, 976–977, 979–980, 1009–1013, 1016–1020, 1025. Petitioners permitted five representatives of the Independent to be relieved of their duties as employees and to be specially assigned by the Independent to visit the car houses during working hours and on time paid for by petitioners, in order to "boost" the Independent and "discredit in every way possible" the "outside" unions (R. I, 745; R. II, 1014, 1020–1021). Petitioners spied

upon union activities,[11] and influenced the credit union functioning among the employees to deny a loan to one O'Connor, who was suspected of having joined an "outside" union. When O'Connor denied membership in the union and signed a statement presented by petitioners' attorneys to the effect that he had not joined and did not intend to join "any outside labor organization," the loan was granted.[12] Superintendent of Traffic Duval and Line Superintendent Wisner "cooperated" with representatives of the Independent in securing the adherence of new employees as they were hired (R. I, 244–245, 285–286, 550). At the time of the hearing only three of petitioners' approximately 3,000 employees were not members of the favored organization (R. I, 506, 546).

Petitioners discharged 10 employees who were outstanding and unintimidated advocates of organization of the employees in "outside" labor unions.[13] Most of the men in question had long

[11] The Board's findings in this regard appear at R. I, 59–62, 66, 67, 71, and the evidence supporting the Board's findings appears at R. I, 552–557, 706–708, 672–674, 584–585; R. I, 472–473; R. I, 442–444, 478, 495–496, 499–500, 509).

[12] The Board's findings respecting this incident appear at R. I, 85–87, and the supporting evidence at R. I, 754–758.

[13] The pertinent evidence in the case of each of the 10 is set forth in the Board's decision (R. I, 62–144). Petitioners have not attacked the Board's findings by reference to any specific evidence, and since it would unduly lengthen this

records of satisfactory service, some exceeding 20 years.[14] Upon their union activity becoming known, however, in every case except one (Silberzahn), their deportment records immediately suffered an extraordinary deterioration and numerous complaints of violations of company rules were filed against them.[15] No other cases of discharges during the years 1940 to 1942 followed a pattern like that of the discharges in question.[16] Supervisory employees made anti-union statements to some of the men discharged and in some instances suggested to the employees that their union activities were responsible for the dismissals.[17]

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brief to set it forth, we do not mention it but refer briefly to the more significant over-all considerations disclosed by the record.

[14] Perry had worked for petitioners since 1919 (R. I, 324), Peacock since 1920 (R. II. 1177; R. I, 715), Rawlings and Pennington since 1922 (R. I, 470, 259), Mueller since 1923 (R. I, 453–454), McHenry since 1927 (R. I, 392; R. II, 1164), Strupp since 1928 (R. I, 368; R. II, 1163), May and Silberzahn entered petitioners' employ in 1940 (R. I, 488–489, 497–498; R. II, 1144), and Flaherty in 1941 (R. II, 1166).

[15] May: R. II, 1209–1210; Rawlings: R. II, 1233–1237, R. I, 476; Pennington: R. II, 1190–1192; Perry: R. I, 348–349; R. II, 1195–1197; Strupp: R. II, 1198–1199; Flaherty: R. II, 1231–1232; McHenry: R. II, 1200–1204; Mueller: R. II, 1206–1208; Peacock: R. I, 735–736, R. II, 1245–1247.

[16] See a table which the trial examiner prepared (R. I, 64–65), summarizing the evidence with respect to these other discharges (R. I, 560–572; R. II, 1126–1177).

[17] E. g., May: R. I, 492–493; Pennington: R. I, 268–269, 273, 522–523, R. II, 1012–1013; Perry: R. I, 358–359, R. II,

On January 1, 1942, petitioners entered into a wage agreement with the Independent (R. III, 513–516) and on January 18, 1942, an agreement concerning working conditions (R. III, 496–513). Petitioners have had annual agreements with the Independent or its predecessor since 1919 (R. I, 53–54; R. II, 924–930, 1045–1051).

The Board concluded that by the foregoing acts petitioners had committed unfair labor practices, in violation of Section 8 (1), (2), and (3) of the Act (R. I, 2, 3, 4, 58–59, 62, 144, 148). It ordered petitioners to cease and desist from these unfair labor practices; to cease giving effect to their agreements with the Independent; to disestablish that organization as bargaining representative; to reinstate the employees discriminated against, with back pay from June 2, 1942, the date of issuance of the Board's complaint; [18] to reimburse all employees for

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1012–1013; Strupp: R. I, 370–373, 377–382, 597–598, R. II, 1215; Flaherty: R. I, 405; Peacock: R. I, 731–733.

During an earlier organizational drive by Amalgamated, Superintendent of Traffic Duval had questioned the employees who joined Amalgamated and declared that if they did the "right" thing they would have steady jobs (R. I, 707–708). Thereafter, the employees ceased to attend meetings of that organization and the charter was surrendered (R. I, 708–709, 754, 760, 762). It was during this earlier period, too, that the Transport Workers Union was conducting organizational activities, in connection with which Brylke was discharged and the charges which the Board dismissed for lack of jurisdiction were filed (p. 4, *supra*).

[18] One employee, Peacock, was in the armed forces, and the Board accordingly directed petitioners to offer him reinstatement upon application within 40 days after his discharge from the armed services (R. I, 7).

dues checked off from their wages since June 2, 1942; and to post the usual notices of compliance (R. I, 5–8).

On May 20, 1943, the Board filed its petition for enforcement in the court below (R. III, 476–481). On August 27, 1943, petitioners filed a motion requesting the court to stay the proceeding during the period in which the Labor-Federal Security Appropriation Act, 1944, would be effective (R. III, 493–495). On October 5, 1943, the court below denied petitioners' motion without opinion (R. III, 524). On January 10, 1944, the court handed down its decision (R. III, 526–538) and entered its decree (R. III, 538–539) enforcing the Board's order, with a modification not here in issue.

ARGUMENT

1. Petitioners' principal contention is that the Act does not apply to their operations (Pet. 5–6, 8–11, 16–23). The court below, upon a consideration of the facts herein and the principles announced in recent decisions of this Court, stated (R. III, 529) that "there can be no doubt that the provisions of the act are applicable to the company's business." We believe that no other result is possible. Moreover, the court's holding raises no conflict with decisions of other circuit courts of appeals.

The test of the Board's jurisdiction under the Act is satisfied in any case where it appears that "stoppage of" the employer's "operations by in-

dustrial strife" would result in substantial interruption to or interference with the free flow of interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41. Where such obstruction would occur, the Court held, the employer's unfair labor practices, shown by long experience and the Congressional findings announced in the Act (Section 1) to be "prolific causes" of industrial strife, have a "close and intimate relation" to interstate commerce and are subject to federal regulation under the Act (301 U. S. at pp. 42, 43). This test is fully met in the instant case.

A cessation or restriction of petitioners' operations by industrial strife would inevitably entail widespread and drastic effects upon interstate commerce. Petitioners annually draw or cause to be drawn into the State of Maryland through the channels of interstate commerce large quantities of materials and supplies which they use in their business. In 1941, these movements involved machinery and equipment valued at over $2,300,000, over one and one-half million gallons of gasoline, over 300,000 gallons of oil, and substantial quantities of electrical energy. This commerce alone brings petitioners' operations within the Board's competence to protect against interruptions or interference which flow from unfair labor practices. *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,*

101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241; *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 115 F. (2d) 414, 416 (C. C. A. 4), affirmed in this respect, 314 U. S. 469, 476; *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. (2d) 380 (C. C. A. 6), certiorari denied, October 11, 1943, No. 114, this Term. Cf., *Local 167* v. *United States*, 291 U. S. 293, 297; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290–291.

A further basis for the Board's jurisdiction is the serious effect the stoppage of petitioners' operations by industrial strife would have upon the many important interstate industries in the great Baltimore industrial area whose workers are transported to and from work on petitioners' trolley cars and buses.[18a] As the court below stated (R. III, 529):

> * * * Baltimore * * * industry is largely engaged in the production of goods for and the transportation of goods in interstate commerce; * * * the proper func-

[18a] Petitioners' officials have repeatedly emphasized in annual reports and other documents that "most workers in defense industries use streetcars or busses to get to work" (Bd. Ex. 49); that Baltimore Transit Company "furnishes all of the public transportation in Baltimore and the surrounding suburbs including the only service to practically all of the important defense industries * * *" (Bd. Ex. 181C); that petitioners are "as important as the Pennsylvania Railroad" (Bd. Exs. 88 DDD–EEE); and that petitioners constitute one of the seven most important industries in the war effort (Bd. Exs. 88 FFF–GGG).

> tioning of the industrial life of such a city is dependent to a large extent upon the transportation furnished by its streetcars and buses; and * * * a tie-up of this means of transportation would in large measure paralyze the life of the city and greatly hinder and impede the flow of the interstate commerce in which the people of the city are engaged.

If petitioners' streetcars and buses cease to run, thousands of workers, employed in great shipyards, steelworks, tin mills, meat packing plants, airplane manufacturing plants, railroads, and other large interstate enterprises, would be unable to reach their places of employment in their usual manner. Such a shutting off of these employees from their jobs obviously would hinder or curtail the production of goods and the interstate flow of large volumes of materials for which these enterprises are responsible. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; cf. *National Labor Relations Board* v. *Bank of America Ass'n*, 130 F. (2d) 624, 626 (C. C. A. 9), certiorari denied, 318 U. S. 791. An interruption of petitioners' transportation system would further affect interstate commerce in that the access which petitioners' facilities provide to interstate shipping wharves, railroad terminals, and airplane lines would be impaired. *Butler Bros.* v. *National Labor Relations Board*, 134 F.

(2d) 981 (C. C. A. 7), certiorari denied, November 22, 1943, No. 274, this Term; *National Labor Relations Board* v. *Carroll*, 120 F. (2d) 457, 458 (C. C. A. 1); cf. *Kirschbaum* v. *Walling*, 316 U. S. 517. Since a stoppage of petitioners' operations would thus exercise "a substantial economic effect on interstate commerce" (*Wickard* v. *Filburn*, 317 U. S. 111, 125), the Act is clearly applicable.[19]

2. Petitioners contend (Pet. 6–7, 11–12, 24–29) that the Board is precluded from remedying and restraining their unfair labor practices because several years before commencement of the instant proceedings the Board administratively affirmed its regional director's refusal, for asserted "lack of jurisdiction" over petitioners' business, to issue a complaint against petitioners on charges alleging unfair labor practices not involved in this proceeding and filed by a labor organization other than the one filing the charges in the case at bar (Statement, p. 4, *supra*). The court below saw "no merit whatever" in the contention (R. III, 530), and its view is clearly correct.

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[19] *McLeod* v. *Threlkeld*, 319 U. S. 491, and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, which petitioners claim are inconsistent with the holding of the court below in the case at bar (Pet. 9), arose under the Fair Labor Standards Act. As the Court pointed out in its opinions in those cases, that act is "more narrowly confined" than the National Labor Relations Act, which "extended federal control to business 'affecting commerce'." The *Higgins* case, 317 U. S. 572, 574; the *McLeod* case, 319 U. S. 491, 493.

Contrary to petitioners' contention (Pet. 24–26), the Board's prior refusal to issue a complaint for an assumed lack of jurisdiction was not an adjudication of the jurisdictional question, but merely "an administrative determination not to take action" (opinion of court below, R. III, 530–531).[20] It is well settled that the principle of *res adjudicata* has no application to the exercise by administrative agencies of their purely administrative powers and duties. *Pearson* v. *Williams*, 202 U. S. 281; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 445; *State Corp. Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 569; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 64.

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[20] All of the cases which petitioners cite (Pet. 25–26) involve final judgments or orders of a court or administrative body determining the rights of litigants; they do not involve administrative refusals to take action such as is involved in the instant case. Contrary to petitioners' assertion (Pet. 24, 26), such an administrative refusal to act is not a reviewable final order under Section 10 (f) of the Act. *Marine Engineers' Beneficial Ass'n* v. *National Labor Relations Board* (not reported), decided April 18, 1943 (C. C. A. 2), certiorari denied, October 25, 1943, No. 357, this Term; *Progressive Mine Workers of America* v. *National Labor Relations Board* (without opinion), October 22, 1940, 3 Labor Cases, Par. 60, 133 (App. D. C.); *White* v. *National Labor Relations Board, per curiam*, December 11, 1941 (App. D. C.). See also *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 406–409; *Federal Power Comm.* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384, 387. Cf. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96, 100 (C. C. A. 3); *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d), 583, 586 (C. C. A. 7).

Moreover, even if the Board's administrative action could be regarded as an adjudication as to jurisdiction, petitioners' reliance upon it would be misplaced. As the court below stated (R. III, 531):

> An administrative agency, charged with the protection of the public, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145; *Houghton* v. *Payne*, 194 U. S. 88, 100. Nor can the principles of equitable estoppel be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials. *United States* v. *San Francisco*, 310 U. S. 16, 32; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *United States* v. *City of Greenville*, 4 cir. 118 F. (2d) 963, 966.

3. Petitioners contend (Pet. 7, 28, 30) that, in any event, the Board should have limited the payment of back pay and checked-off dues reimbursement [21] to February 1, 1943, the date when the Board's decision and order issued, and not, as it did (R. I, 4, 5, 7), to June 2, 1942, the date when the Board issued its complaint herein. But,

[21] We discuss at pp. 22–23, *infra*, petitioners' contention that any checked-off dues reimbursement provision was beyond the Board's power in the circumstances of this case.

obviously, it was on June 2, 1942, when the Board took administrative action contrary to its earlier refusal to issue a complaint, that petitioners were advised that the Board was no longer adhering to its earlier position as to jurisdiction. There is nothing unreasonable in holding petitioners to account for their continued misconduct after that date.

4. Petitioners' contention that the Board's findings as to the unfair labor practices are not supported by substantial evidence (Pet. 8, 13, 30–31) presents no question of general importance. Moreover, the evidence summarized in the Statement (*supra*, pp. 8–14) affords full support for the challenged findings, as the court below properly held (R. III, 532, 533–535).

5. Petitioners' contention (Pet. 7, 12, 29, 30), that the Board improperly ordered petitioners to reimburse their employees for moneys checked off from their wages as dues to Independent, likewise presents no question of general importance. This Court recently sustained the Board's power to issue such an order in *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533.[22] The Board correctly applied the

[22] The decisions of the circuit courts of appeals which petitioners cite (Pet. 12, note 2) as in conflict with the holding below were rendered before this Court's decision in the *Virginia Electric* case. In the only subsequent circuit court of appeals decision (*National Labor Relations Board* v. *Cassoff*, 139 F. (2d) 397), the Second Circuit Court of Appeals enforced *per curiam*, 43 N. L. R. B. 1193, ordering the employer

principles of the *Virginia Electric* case to the particular facts of the instant case. As the court below pointed out (R. III, 537), the absence of a closed-shop contract such as existed in the *Virginia Electric* case is not conclusive; the test is whether it may fairly be said that the employees, in joining the dominated organization and in "agreeing" to the deduction of dues from their wages, exercised a free choice or acted under compulsions exerted by the employer for its own unlawful purposes. See the *Virginia Electric* case at pp. 541–544. This test is fully met here. In the circumstances reviewed in the Statement (pp. 8–14, *supra*), the employees were just as firmly bound to support the Independent, by which petitioners foreclosed their right to freedom of self-organization, as if their jobs literally depended on it;[23] and petitioners, by granting check-off privileges, just as firmly fastened upon the employees the cost of maintaining it.

6. Petitioners contend (Pet. 7, 12, 29–30) that the Board abused its discretion in ordering them to post notices stating without more that their employees are free to become or remain members of the particular labor organizations which petitioners had opposed, and that petitioners will

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to reimburse employees for dues checked off to an A. F. of L. union which the employer had assisted in violation of Section 8 (1) of the Act.

[23] The court below stated (R. III, 537): "* * * circumstances disclosed by the evidence here practically made membership in Independent compulsory."

not discriminate against the employees because of membership or activity in those organizations. But it clearly was not an abuse of the Board's discretionary power in determining how the effects of petitioners' unfair labor practices might be expunged to require petitioners to notify their employees that they were free to adhere to the particular labor organizations against which petitioners' discriminatory conduct had been directed. On the contrary, this provision seems peculiarly "adapted to the situation which calls for redress." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. While several circuit courts of appeals have, in cases cited in the petition for certiorari (Pet. 12, note 3), required the inclusion in the Board's notices of a further statement in substance that the employees are free to join any union they choose,[24] these courts have in other cases enforced provisions identical with the one here chal-

[24] The *Westinghouse*, *Standard Oil*, and *Elizabeth Arden* cases cited in the petition are decisions of the Circuit Court of Appeals for the Second Circuit; the *Weirton Steel*, *Baldwin Locomotive Works*, and *Roebling* cases are Third Circuit Court of Appeals decisions; the *American Rolling Mill* case, *New Idea, Inc.*, *Precisions Castings*, and *Cleveland-Cliffs Iron Co.* were decided by the Sixth Circuit Court of Appeals; the *Reliance Mfg. Co.* case, by the Seventh Circuit Court of Appeals; the *Harbison-Walker Refractories Co.* case, by the Circuit Court of Appeals for the Eighth Circuit; and *Colorado Fuel & Iron Corp.*, by the Tenth Circuit Court of Appeals. See also *Cudahy Packing Co.* v. *National Labor Relations Board*, 102 F. (2d) 745, 753 (C. C. A. 8), certiorari denied, 308 U. S. 565.

lenged.[25] This indicates that these courts have adopted no hard and fast rule but vary their decision according to the facts presented. Even if the instant decision may be regarded as conflicting with these decisions, the numerous minor changes made by the courts in the wording of Board notices do not appear to raise issues of sufficient importance to warrant the granting of a writ of certiorari. The employer in *National Labor Relations Board* v. *Aintree Corp.*, 132 F. (2d) 469 (C. C. A. 7), raised the same question in its petition for certiorari (No. 702, October Term, 1942, Pet. 3, 17–18, 23, 25–27), but the petition was denied, 318 U. S. 774.

7. Petitioners contend (Pet. 8, 13, 31) that they were denied a fair hearing because of the conduct of the Board's attorneys and the trial examiner who presided at the hearing at which the evidence in the case was taken. In support of their contention petitioners refer the Court to their excep-

[25] E. g., *National Labor Relations Board* v. *Regal Knitwear Company*, decided February 15, 1944 (C. C. A. 2), enforcing 49 N. L. R. B. 560, 562; *National Labor Relations Board* v. *Poultrymen's Service Corp.*, 138 F. (2d) 204 (C. C. A. 3), enforcing 41 N. L. R. B. 444, 467; *National Labor Relations Board* v. *American Creosoting Company, Inc.*, 139 F. (2d) 193 (C. C. A. 6), enforcing 46 N. L. R. B. 240, 261; *National Labor Relations Board* v. *Barrett Co.*, 135 F. (2d) 959 (C. C. A. 7), enforcing 41 N. L. R. B. 1327, 1352–1353; *Carter Carburetor Corporation* v. *National Labor Relations Board*, decided February 21, 1944 (C. C. A. 8), enforcing 48 N. L. R. B. 354, 361; *National Labor Relations Board* v. *Denver Tent and Awning Co.*, 138 F. (2d) 410 (C. C. A. 10), enforcing 47 N. L. R. B. 586, 587–588.

tions Nos. 168 to 191 lodged with the Board to the trial examiner's intermediate report (Pet. 31). A reading of the record as a whole and of the appendix to the Board's decision, in which the Board fully discussed the exceptions (R. I, 8–22), shows, however, that petitioners in fact received a full and fair hearing and that their exceptions are wholly lacking in substance.

8. Finally, petitioners contend (Pet. 8, 13, 31–32) that the proviso attached to, and limiting the Board's use of, its current appropriation [26] precludes enforcement of the Board's order. The court below properly characterized this contention as "so lacking in merit as not to warrant discussion" (R. III, 538). It stated that "It is manifest that a limitation upon spending by the Board may not be construed as a limitation upon the jurisdiction of this Court to enforce a Board order" (*ibid.*). Other circuit courts of appeals have been uniformly of the same view.[27]

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[26] "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed * * *" (Labor-Federal Security Appropriation Act, 1944, Act of July 12, 1943, Public Law No. 135, 78th Congress, 1st Session; Title IV, National Labor Relations Board Appropriation Act, 1944).

[27] *National Labor Relations Board* v. *Elvine Knitting Mills, Inc.*, 138 F. (2d) 633 (C. C. A. 2); *National Labor Relations Board* v. *National Tool Co.*, 139 F. (2d) 490 (C. C. A. 6); *National Labor Relations Board* v. *Cowell Portland Cement Co.* (without opinion), decided September 7, 1943 (C. C. A. 9).

Moreover, the proviso does not apply to the instant case. It affects only cases where an agreement "has been in existence for three months or longer without complaint being filed." The word "complaint" obviously means the charge filed "with the National Labor Relations Board" by "management" or "employees," not the pleading with which the Board institutes its action. See the statements of the sponsor of the proviso during the Congressional debate. 89 Cong. Rec. 5958–5959; see also *id.*, 6567, 6951. The Comptroller General, who enforces legislative restrictions upon appropriations, has ruled specifically in this connection (Decision No. 35803, rendered July 29, 1943 (unreported)) that the proviso—

> limits the use of funds to those cases in which *charges have been filed with the Board* within three months of the execution of a labor agreement, but prescribes no limitation as to the time within which a complaint may be issued by the Board. [Italics supplied.]

The contracts involved in the instant case were executed on January 1 and 18, 1942, respectively (R. III, 494, 496–516, 518); the charge initiating the proceedings was filed within three months, on March 5, 1942 (R. II, 1178–1179), not on June 1, 1942, as petitioners assert Pet. 32. Petitioners refer apparently to a second amended charge filed on June 1 (R. II, 783), but this did not change the

essential nature of the proceeding as set forth in the charge originally filed.

Moreover, the Board's decision and order herein were issued on February 1, 1943 (R. I, 1–8). The proviso applies to the year beginning July 1, 1943. The Comptroller General has properly ruled (Decision, *supra*) that the proviso does not preclude the Board from—

> expending from its appropriation such amounts as may be necessary in connection with further proceedings in those cases as to which a decision and order were issued by the Board prior to July 1, 1943.

CONCLUSION

For the foregoing reasons, it is respectively submitted that the petition for a writ of certiorari should be denied.

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MARCH 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less

than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such

unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall

be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, * * * by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board

as to the facts, if supported by evidence, shall in like manner be conclusive.

The pertinent provisions of the Labor-Federal Security Appropriation Act, 1944 (Act of July 12, 1943, Public Law 135, 78th Congress, 1st Session; Title IV, National Labor Relations Board Appropriation Act, 1944) are as follows:

> * * * No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: *Provided,* That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person.

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No. 735

IN THE

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OCTOBER TERM, 1943.

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THE BALTIMORE COACH COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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The brief for the National Labor Relations Board in opposition to the petition presents eight questions, and the argument (p. 15) discusses those questions in the order in which they are stated. The following reply is respectfully submitted:

1. The Board's statement that the finding by the court below that the National Labor Relations Act applies to petitioners "raises no conflict with decisions of other circuit courts of appeals" is somewhat disingenuous. The precise question has not been raised in any other jurisdiction. This is the first case in which the Board has attempted to extend its jurisdiction over an employer engaged solely in local public passenger transportation for hire. Until its decision in this case, the Board itself ruled with respect to these petitioners that the Act did not apply, and made the same ruling with respect to similar services, such as those furnished by taxicab companies (Petitioners' Brief, pp. 16, 17). The ruling on jurisdiction in this case, therefore, is in conflict with every prior decision made on the subject by the National Labor Relations Board, the only tribunal authorized by Congress to determine the question in the first instance.

The Board's contention that petitioners' operations affect interstate commerce in the constitutional sense is based upon the statement (a) that many important interstate industries would be adversely affected if the employees of such industries could not use petitioners' trolley cars and buses for transportation to and from work; and (b) that petitioners annually "draw or cause to be drawn" into the State of Maryland large quantities of materials and supplies.

As to (a) the transportation of workers, the Board makes no denial or explanation of the fact that the choice of means of transportation, where transportation is necessary, is made by the individual worker and not by the employer; that there is no relationship, contractual or otherwise, between petitioners and industries engaged in interstate commerce, imposing any obligation on petitioners to transport

workers for any particular plant to any place at any time. Petitioners' transportation services are available to the general public, and it does not know the business or destination of its passengers. The effort here is to make federal regulation depend, not upon petitioners' business but upon the business engaged in by their patrons. There is no precedent for the Board's action. It is a clear violation of the interpretation of the National Labor Relations Act, and of the Commerce Clause of the Constitution, expressed by this Court in *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, and other cases cited on petitioners' brief. Petitioners' operations do not affect interstate commerce in any "close and intimate" fashion; they do not, in a constitutional sense, affect interstate commerce in any manner. The only case not heretofore mentioned cited by the Board on this point is *N. L. R. B. v. Carroll*, 120 F. (2d) 457 (C. C. A. 1), which decided that an employer engaged under government contract in the interstate transportation of mail is an independent contractor; that the truck drivers engaged by him are his employees and not employees of the United States, and that he is subject to the provisions of the National Labor Relations Act. Nothing in that case seems to throw any light on the question under discussion.

As to (b) the statement (Board's Brief, p. 16) that petitioners annually "draw or cause to be drawn" into the State of Maryland large quantities of materials and supplies, the Board fails to comment on the fact that nothing brought into the State, such as equipment and supplies, is resold or processed for resale; that interstate commerce with respect to such purchases (which are not made regularly) ends when delivery is made to petitioners; that, therefore, interstate commerce as to any materials and supplies purchased by petitioners from time to time outside the State

is completed before such materials and supplies are used in petitioners' business; that there is no showing in the record that industrial strife on petitioners' property could possibly affect the purchase or delivery of materials and supplies used by petitioners, or in any manner affect commerce in such articles; and that petitioners do not cause any inward or outward flow of commerce preceding manufacture or sale. The Board says that "these movements" include gasoline and oil, and substantial quantities of electrical energy, although it is undisputed on the record that all of the gasoline and oil and electrical energy used by petitioners is purchased from dealers within the State. And there is no proof that any electrical energy used by petitioners came at any time from outside the State. Under the Board's theory, the purchaser in retail stores of a pound of nails, a necktie, a dress, a suit of clothes, or bar of soap would be engaged in a transaction affecting interstate commerce because the purchaser had caused those articles "to be drawn" into the State; or, as the Board argued in the lower court, had purchased materials "originating" outside the State.

There is no sound basis for these contentions, and no authority, save the lower court's, to support them. The Board does not answer the assertion that its attempt to extend the area of its jurisdiction reverses prior administrative, judicial and legislative construction of the limitations on the application of the Act, and involves the nullification of state labor relations acts. The Board's argument in support of its claimed jurisdiction confirms petitioners' statements in their petition and brief that the Board relies on principles hitherto unknown to the law, and emphasizes the necessity for issuance of the writ of certiorari, so that the questions involved may be finally determined.

2. The Board argues (Board's Brief, pp. 19-21) that its prior ruling that it lacked jurisdiction and that the Act did not apply to petitioners was not an adjudication of the jurisdictional question "but merely an administrative determination not to take action". The lower court erroneously adopted this answer to the defense of res judicata and equitable estoppel. *N. L. R. B. v. Baltimore Transit Co.*, 140 F. (2d) 51, 54 (No. 1, March 13, 1944). The Board says it "administratively" affirmed its Regional Director's finding of lack of jurisdiction. It points out, as did the lower court, that the charges involved in the instant case were filed by a different labor organization, and that the unfair labor practices were also different. But these contentions have no weight. The jurisdictional facts are the same now as they were when the prior ruling was made. The ruling was binding on the Board and on petitioners, who are the only parties under the Act. It was likewise binding generally, as all jurisdictional determinations are. The lower court fell into the error of assuming that different charges or different complainants could have any bearing on the question of the application of the Act or the extent of the jurisdiction vested by Congress in the Board. The attempt to make the Board's ruling an administrative determination, not binding on the Board or anyone else, and not subject to review, does not bear analysis. A charge was filed against petitioners in the manner contemplated by the Act and by the Board's rules and regulations. It was considered by the Board's Regional Director, as provided by the Act and the rules and regulations. The charge was dismissed by the Regional Director after thorough investigation, for lack of jurisdiction. On appeal to the Board, the Regional Director was affirmed. This was a final order. The party aggrieved had a right to seek a review, as provided by Section 10(f) of the Act, but no

petition for review was filed. The lower court says "there was no adjudication by the Board of the question of jurisdiction or any other issue," but this finding is clearly erroneous. There is no way, other than that followed, for the Board to adjudicate the question of jurisdiction. None of the cases cited on the Board's brief, note 20, p. 21, supports the Board's argument that its ruling on jurisdiction was of such an administrative nature as to have no binding effect, and as to be outside of the provisions for review. *American Federation of Labor v. N. L. R. B.*, 308 U. S. 401, cited by the Board, decided that the certification by the Board in representation proceedings under Section 9(c) of the Act was not such an action as was reviewable under Section 10(f). The Court pointed out, however, that the right of review was given any person aggrieved by a final order granting or denying the relief sought against unfair labor practices. *Federal Power Comm. v. Metropolitan Edison Co.*, 304 U. S. 375, also cited by the Board, merely decides that such administrative orders by the Federal Power Commission as those fixing a hearing and requiring respondent to appear and produce certain information; and granting a rehearing of the first order, are not reviewable under the Federal Power Act. Other cases on this point cited by the Board, to the extent that any of them are relevant, hold that the Board, where exercising discretion, cannot be compelled to issue a complaint. In the case at bar, however, the question involves the Board's refusal to issue a complaint, not in the exercise of its discretion, but because of what it now says was a mistake of law. There is no authority for the Board's contention that its order dismissing a charge, if based on a mistake of law, is not reviewable on the petition of the aggrieved person. The case of *Jacobsen v. N. L. R. B.*, 120 F. (2d) 96, seems to be authority against the Board's view.

The most important feature of the situation, which the Board does not mention in connection with this point, is that the Board, in disregarding the principles of res judicata and equitable estoppel, is here attempting to find that petitioners violated the Act, and to impose remedies for such alleged violations, during the period when, under the Board's ruling, the Act did not apply to petitioners. The Board cites no authority for its action in applying remedies retroactively. There is no such authority.

3. The Board (Board's Brief, p. 21) attempts to justify its order for checked off dues and back pay reimbursement after June 2, 1942, the date when the complaint was issued, instead of from February 1, 1943, the date when the prior ruling was reversed, by contending that the issuance of its complaint was notice to petitioners that the Board had changed its position as to the applicability of the Act. In other words, the Board argues that the issuance of its complaint was a new adjudication of the question of jurisdiction, and a reversal of its prior ruling. This contention is discussed in petitioners' brief, p. 30. The Board omits discussion of its action in ordering reinstatement of employees discharged during the period when, under the Board's ruling, the Act did not apply. The Board, under the circumstances of this case, has no authority to order reinstatement or back pay reimbursement.

4. The Board submits its own version of alleged unfair labor practices by petitioners as support for its statement that the Board's findings presents no question of general importance (Board's Brief, p. 22). This question is, of course, highly important to petitioners, and to all who may be charged with violations and subjected to the Board's processes, investigations and findings.

5. The Board argues (Board's Brief, p. 22) that the order requiring reimbursement of checked-off dues presents no question of general importance. But the Board's action does present a question of tremendous importance, involving, as it does, an effort by the Board to stretch the decision in *Virginia Electric & Power Co. v. N. L. R. B.*, 319 U. S. 533, to cover all cases of checked-off dues. The statement made by the Board that the test of voluntary union membership applied in the Virginia Electric case is "fully met here" is unwarranted. The Board does not mention the fact that a number of members of the Independent preferred to pay their dues directly and declined to authorize check-off; that neither membership nor check-off was compulsory; that hundreds of employees became members of both unions, many retaining membership in the Independent because its revenues were used largely for sick and death benefits; and that some five hundred employees, some or all of whom became members of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees (AFL) eventually resigned from the Independent Union (R. III, 490), and thereafter paid no dues to the Independent, either by check-off or otherwise. It should be noted that, under the Board's order, the employees who declined to authorize any check-off of union dues do not obtain reimbursement, but those who voluntarily authorized the check-off are entitled to a refund of dues. The Board's witnesses testified at length as to the fairness and advantages of the beneficial features of the Independent, and there were no requests for refund of dues. Above all, however, is the fact that the circumstances are not similar to those considered by this Court in the *Virginia Electric* case, and the Board's statement to the contrary is not supported by the record.

6. The Board argues (Board's Brief, p. 23) that it has power to require petitioners to post notices that their employees are free to join certain designated labor organizations, despite thirteen Circuit Court of Appeals decisions to the contrary cited by petitioners (Pet. 12, note 3). The Board cites a number of cases in which the Board's order contained similar provisions, but it does not appear from the opinions that the question of validity was raised or, if it was raised, that the courts ruled on it. The fact remains that, in every case in which the question has been considered and determined in the Circuit Courts of Appeals, the action of the Board has been found to be invalid. And it is apparent that, despite these decisions, the Board continues to pass invalid orders. The Board says this matter is of minor importance, but this Court has not hesitated to order corrections of even less significance. *J. I. Case Co. v. N. L. R. B.*, No. 67, October Term, 1943, decided February 28, 1944. *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348, cited by the Board, is not authority supporting the Board's order in this case. This Court merely held that the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress. This does not mean that the Board can grant relief beyond its powers.

7. The Board argues (Board's Brief, p. 25) that petitioners were given a fair hearing by the trial examiner, but petitioners believe that their contention that they were denied due process is amply supported by the record.

8. The Board contends (Board's Brief, p. 26) that the National Labor Relations Board Appropriation Act, 1944, does not apply. It says (a) that the statute affects only cases where an agreement "has been in existence for three months or longer without complaint being filed". It then

says that the word complaint, which refers in the National Labor Relations Act to an action instituted by the Board, means a charge filed with the Board by any person or organization. This interpretation nullifies the purpose for which the act was passed, and that purpose was to prevent the Board from instituting complaint cases or proceeding with those already instituted. Senator McCarran (Nev.) author of the motion that the Senate concur in the House amendment containing the restriction, was the only Senator who undertook, on the floor of the Senate, to define "complaint case". Senator McCarran (July 2, 1943, Cong. Rec. p. 7108) said: "What is a complaint case? It has been developed before the Senate Appropriations Committee that a complaint case is a case filed by the National Labor Relations Board."

Having interpreted "complaint" issued by the Board to mean "charge" filed with the Board by any person, the Board then says that the charge instituting these proceedings was filed within three months. This is simply not so. The contracts involved were executed on January 1 and January 18, 1942. The complaint was filed on June 2, 1942, long after the three months had expired. Even if "complaint" means "charge", it came too late, because the complaint of June 2, 1942 was based on a charge made June 1, 1942, and petitioners were formally notified to that effect (R. II, p. 795). There were earlier charges filed on March 5, 1942 and March 9, 1942 (R. II, pp. 1178, 1180), but these charges were abandoned in favor of the charge made June 1, 1942. No complaint was issued on the earlier charges, and they cannot, at this late date, be used as an instrument to continue the Board's authority which has been removed by Congress. The Board also says that the Appropriations Act does not apply to complaint cases in which

the Board had issued a decision and order prior to July 1, 1942, but the statute contains no such exemption.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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Dated: March 24, 1944.